APPENDIX A

The Authorities Show Unanimously That the Stay Constitutes a Grave Abuse of Discretion

Mercantile Trust Co. v. *Lamoille Val. R. Co.*, Fed. Cas. No. 9432 (C. C. Vt. 1879). Although there were also demurrers and pleas in abatement, the relevant question in this case arose on a motion for a stay until a suit in the State court *"should be completed"*. The plaintiff in the Federal court was the owner of bonds of the defendant railroad. He sued on behalf of himself and the other bondholders to foreclose the mortgage securing the bonds, and to remove the mortgage trustees, who of course were made defendants. He alleged that one of the trustees was *also* the sole trustee under a prior alleged preference mortgage, which was being foreclosed in the State court. In the State foreclosure suit there was also a cross bill by this trustee under the preference mortgage to foreclose it, *and the plaintiff in the Federal court had been named as a party defendant to this cross bill,* and had been served with process outside the State (which service was therefore held invalid) before service in the Federal suit. *Manifestly the plaintiffs in the State suit desired to have the plaintiff in the Federal court a party defendant in the State court, and therefore this plaintiff could have appeared voluntarily as a defendant in the State court had he chosen to do so, and could have litigated to prompt adjudication in that court the identical questions which he had chosen to litigate in the Federal court.* Nevertheless, the Federal court refused to grant the stay, "and thereby compel the plaintiff to become a party there, if not already one, and to proceed there instead of here", and to suffer an indefinite

delay in the prosecution of his Federal court suit. The court said (p. 26):

> "*But, courts have not the right to disown their jurisdiction.* It is their duty to hear and determine causes properly brought before them, and to determine whether they are properly so brought, if such question arises, and not to advise or compel the parties to go elsewhere for relief, *even though it should appear that the relief might better be obtained elsewhere.* In Magna Charta, c. 29, it was declared by the king, for his courts: '*Nulli vendemus, nulli negabimus, aut differemus, rectam, vel justitiam.*' This is fundamental to the duties of courts. The duty cannot be fulfilled by sending parties elsewhere for what they have a right to here, *nor by compelling them to wait until some other time for what they have a right to now.* If the plaintiff has a right to prosecute this suit in this court, it has, also, the right to have it proceeded with according to the course of the court, and, as question is made as to whether it has the right to so proceed, it has the right to have that question heard and determined, as may appear to be right, also. There was no proper course but to hear the parties upon the questions raised, and there is no proper way now but to pass upon them."

It will be observed that the motion was denied in this case despite

> (a) the fact that the moving party *was willing and was seeking to make his adversary a party to the other suit,* which, moreover, had been commenced first, and
>
> (b) the fact that if that adversary had consented to be brought into the other suit, he could have

promptly litigated in it the *identical* issues which he was seeking to litigate in the court where he had brought his own suit.

Wadleigh v. *Veazie,* Fed. Cas. No. 17,031 (C. C. Me. 1838). Here there was a common-law plea in abatement, based on the prior pendency of an action between the same parties in the State court. The two actions were for the recovery of the same land. The issues in the two cases, though similar, were not identical. The defendant in the Federal court (who interposed the plea in abatement) *was, however, the plaintiff in the State court* and therefore under the common-law rule the court (Story, *J.*) held the plea bad. Having thus disposed of the plea as a strict common-law plea in abatement, the court, however, *then went on to treat it on a broader basis* as seeking *to invoke some general discretionary power* of the court in the matter of granting delays. *In other words, he treated it as a motion for a "stay".* On this aspect of the case the court said (p. 1320):

> "But it is suggested, that this court possesses a sort of *discretionary authority* in cases of this sort, where there is a concurrent jurisdiction in the state court and in this court, to interfere to prevent a collision of jurisdictions and *a conflict of decisions* as to the title to the land. I know of no such authority. If the parties are rightfully before this court in a case within its jurisdiction, however unpleasant it may be to entertain a suit here, in regard to which there may possibly be a diversity both of verdict and judgment from those given in the state court, I know not how that is to be avoided. I should deeply regret such an occurrence; but still I am not aware, how the court can escape from its duty, in any case, which congress has confided to its jurisdiction. If a plain-

> tiff should bring an ejectment in a state court, and should recover and be put into possession, and then the defendant, being a citizen of another state, should bring an ejectment in the circuit court of the United States, in the same state, to recover back possession of the land, *I know of no power in the circuit court to stay,* or control the suit, or to refuse jurisdiction over the cause."

These remarks have additional force as coming from so eminent an authority as Mr. Justice Story.

Loring v. *Marsh,* Fed. Cas. No. 8514 (C. C. Mass. 1864). The plaintiff filed a bill in equity to compel an accounting by the trustee under a will. Defendants moved for a continuance *pending the determination of a prior suit in equity brought in the State court and already pending on appeal in the Supreme Court of the State.* The plaintiff against whom the stay was sought was a party defendant in the State court. Denying the motion the court said (p. 901):

> "The theory of the motion is that the construction of the will and devise referred to in the motion depend upon the local law, and that the cause should be continued until the state court shall determine what is the true intent and meaning of the local law upon that subject, and not that there is any conflict of jurisdiction, arising out of the fact that the bill of interpleader was filed in the state court two days before the bill of complaint was filed in this court.
>
> * * *
>
> "Looking at the whole case, it is clear that there are questions presented in this record which are not involved in the record in the state court, and which cannot be decided there under the pleadings exhibited

> in this case. On the other hand, it is equally clear that there is a question common to both cases, and that that question is one which has not been directly decided by the state court, and that it depends upon the construction of the local law. Taking the case as stated, the question is, what is the proper course to be pursued? * * * *Pending controversies, whether at law or in equity, are subject to many contingencies by which they may be retarded or prevented from being prosecuted to judgment, and yet the argument is that the cause must be continued indefinitely, until the question depending upon the local law is determined by the state court.* The industry of counsel, however, has not furnished the court with any decided case which supports any such proposition, and the researches of the court in that behalf have not been attended with any better success."

We thus have a Federal court refusing to grant a stay until the final determination of a case already pending on appeal in the highest court of the State, the decision of which court on a material issue in the Federal suit would be binding on the Federal court, although the party sought to be stayed was a party to the other case.

Checker Cab Mfg. Co. v. *Checker Taxi Co.*, 26 F. (2d) 752 (D. C. N. D. Ill. 1928). This was a suit in equity to recover profits under a contract. At the time the bill was filed there was pending in the State court a bill of review brought by the defendant in the Federal suit, seeking to correct a decree in a still earlier suit between the same parties which was based on the same contract involved in the suit sought to be stayed. After the commencement of the suit sought to be stayed the defendant in it filed in the State court an amended and supplemental bill seeking the

same relief sought in the original bill and, in addition, praying that the contract be cancelled for fraud. This defendant then asked the Federal court to stay proceedings until its suit in the State court had been adjudicated.

The Court said (p. 752):

> *"The sole question is whether the court has the discretion to stay the proceedings here* until the determination of the suit in the state court. Plaintiff obtains jurisdiction by reason of diversity of citizenship. *Under the Constitution and laws of the United States it has an absolute right to try its case in this forum.* The pendency of the state court action is not a bar, and it would seem apparent that *this court may not exercise its discretion to deprive plaintiff of its constitutional right to a trial in this court.* * * *"*

National Motor Bearing Co., Inc. v. *Consolidated Motor Parts Co.*, 6 Fed. Supp. 811, 812 (E. D. N. Y. 1934). The plaintiff's bill was for an injunction and an accounting for alleged infringement of his patent by the defendant, a dealer. The plaintiff had instituted a prior suit for infringement against the manufacturer from whom the defendant dealer had bought. The defendant dealer moved for a stay pending the final adjudication of the suit against the manufacturer. His affidavit showed that the manufacturer's attorneys were representing him and that his expenses were being assumed by the manufacturer.

Here we have the case of *the same plaintiff* suing two different defendants in two cases involving identical issues, with the later-sued defendant asking for a stay on the ground that the first-sued defendant is (at least as be-

tween himself and the other defendant) primarily liable, and that he should therefore first defend the first commenced action. In short, *the party seeking the stay was willing to let the issues in his case be tried in an action to which he was not a party.* And yet the court denied the motion, saying:

> "No case has been cited by the defendant in which a dealer has been accorded a stay upon the theory that he ought not to be called upon to defend his own alleged infringement because the manufacturer is meeting the same issue in another forum."

Dunfee v. *Childs*, 53 S. E. 209, 59 W. Va. 225 (1906). The defendant in a suit in equity moved for a stay of proceedings pending the determination of an appeal to the Supreme Court of the State in another action concerning the title to the same realty involved in the suit sought to be stayed. The moving party was a party to the other suit. The motion was under a *statute* which provided that (p. 212):

> "whenever it shall be made to appear to a circuit court, or to the judge thereof in vacation, that a stay of proceedings in a case therein pending should be had, until the decision of some other action, suit or proceeding in the same or another court, such court or judge shall make an order staying proceedings therein upon such terms as may be prescribed by the order."

In affirming the denial of the stay the court pointed out that, as the statute did not lay down any criteria for the granting of stays, the question would have to be governed by common-law principles. The court said (p. 212):

> "The statute does not prescribe the conditions calling for a stay, *but any action under it must be governed by the common-law principles relating to the subject. A suitor's suit cannot be suspended merely because a legal question may be common to the two suits. He has a right to demand that the court shall decide such question, and not wait for its decision by another court.* The decision in the other suit must have legal effect in the suit in which the stay is asked, and close its litigation. *If it operate on only one of two litigated matters, it ought not to be granted, because it does not cover the whole case.*"

In several cases where trial courts have improperly granted stays, writs of *mandamus* or *prohibition* have issued directing them to proceed or not to interfere with the progress of the cause according to the calendar of the court.

In *Dalgarn* v. *New Orleans Land Co.*, 109 So. 345, 161 La. 653 (1926), after a jury was impanelled and the issues presented to the court and jury and the arguments of counsel heard, the court, on its own motion, discharged the jury and continued the case, pending the outcome of an appeal in another case involving the interpretation of a contract similar to the one involved in the case before him. The judge gave as his reason that he "could not conscientiously pass on the merits of the cause until certain facts which were at issue in suit No. 130101, now before the supreme court, were determined". Writs of mandamus and prohibition were granted to compel him to proceed with the trial. *In this case again the parties to both suits were the same.* The Appellate Court stated (p. 346):

> "It is clear to us that, while both of petitioner's suits against the New Orleans Land Company grew out of the same original contract, each suit presents an entirely different and distinct cause of action."

In *Jefferson Standard Life Ins. Co.* v. *Keeton*, 292 Fed. 53 (C. C. A. 4th 1923), plaintiff insurance company filed its bill in the Federal court for cancellation of an insurance policy. Thereafter, but before hearing, the beneficiary instituted an action at law upon the same policy, which was removed to the Federal court. The trial court refused to enjoin the prosecution of the law case. On the appeal from this order the insurance company called the attention of the court to "the clear intimation of the learned judge below that he proposes to postpone the hearing of the equity causes until after the determination of the actions at law". This the reviewing court said he could not do (p. 56):

> *"Nor has the equity judge any right to stay his hand until the actions at law have been tried. If the latter were still pending before another court, he could be compelled by mandamus, if necessary, to hear and determine the causes before him without waiting upon the proceedings of the other forum. McClellan* v. *Carland, supra; Barber Asphalt Co.* v. *Morris, supra.* They are now all before the court below and should stand for trial in the order in which they were instituted."

Here again the parties to both proceedings were the same.

Bergholm v. *Peoria Life Ins. Co.*, 63 S. W. (2d) 1064 (Texas 1933), arose on a petition for mandamus to compel the trial court to proceed with the trial of a suit upon an insurance policy. The insurance company had already

brought a suit in the Federal court to cancel the policy. The company therefore moved *for a continuance of the State action pending determination of the Federal suit in equity.** The trial court granted a continuance *until the determination of the Federal suit or until the second following term of the State court, whichever should come first.* The trial court had said (p. 1064):

> "'From such hearing the court finds that to continue this cause until the term of this court beginning in January, 1934, will *expedite the trial of this cause and the final disposition thereon;* that such a continuance *will avoid confusion in this court;* that it will be more expeditious to continue the trial of this cause until said time; that such a continuance *will make it probable and possible that a more complete record may be had on the trial of this cause;* that such a continuance will more nearly serve the best interests of the parties to this suit and of this court in the trial of this cause; * * *'"

Granting the mandamus directing the trial court to permit the relator to proceed with her trial "agreeable to the principles and usages of the law", the Court of Civil Appeals said (p. 1065):

> "The effect of the trial court's order quoted above, as we construe the record, was to continue the case for two terms, thus suspending the right of relator to prosecute it. * * * It is plausibly argued that a trial court has discretion about continuances, particularly if the condition of his docket is such as to preclude the trial of certain cases, and that we could

*There was also a plea in abatement which, however, was bad, since the plaintiff in one suit was the defendant in the other. See *Wadleigh* v. *Veazie, supra,* p. iii.

> presume here that the court acted on his own motion. While we think the record is sufficient to rebut this presumption, we would not feel authorized to indulge such presumption in the face of an order which continues the case, not to the next term of court, but to the term after that. * * *"

The court then discussed certain *statutory* provisions: (1) that continuances shall be granted only for sufficient cause supported by affidavit,* (2) that every suit shall be tried when called, unless continued or postponed to a future day of the term, and (3) that it shall be no cause for postponement of a trial of the issues of law that the parties are not prepared to try the issues of fact. It is true that the court said: "We will not indulge the presumption that the trial court of his own motion suspended the prosecution * * * in such manner as to deny all parties their legal rights *under the statute*"; but the right of a litigant to proceed with the trial of his cause *subject to the convenience of the court's docket*, is a right which is recognized independently of statute. And the court further said:

> "If there could exist such an extreme state of facts that would justify a court in exercising his equity powers to continue a cause beyond the next ensuing term of court (a matter we do not decide), such showing should affirmatively be made to appear in the record. None such appears here."

Here we have a square holding that, *even where the parties and the issues in the two cases are identical*, so that a plea in abatement would be good except (a) for the fact that one case was in a Federal and one in a State court, and

*Similar to Equity Rule 51 of the Supreme Court of the District of Columbia.

(b) for the fact that the plaintiff in one case was the defendant in the other, *nevertheless it was an abuse of discretion to continue the later commenced case for only two terms.*

See also *Dunphy* v. *Belden*, 57 Cal. 427; *Cates* v. *Mayes*, 12 S. W. 51 (Supreme Ct. Texas 1889); *Farmers' Co-op. Gin Co.* v. *Harper*, 268 Pac. 256, 131 Okla. 224 (1928); *Wood* v. *Lake*, 13 Wisc. 84 (1860); and *Granger* v. *Judge of Wayne Circuit*, 27 Mich. 406 (1873).

In *Toplitz* v. *Miller*, 32 Fed. 744 (S. D. N. Y. 1887), *the plaintiff in several different cases* moved that all of the cases except the one first instituted be stayed pending the decision of the first case, *which was already pending in the Supreme Court.* Affidavits in opposition alleged that the issues in the cases sought to be stayed were different from those in the case in the Supreme Court. The motion was denied on the ground that doubt existed as to whether the issues in the cases were identical. The court said:

> "*This court will not try the subsidiary question whether the issues in these cases are identical with those in another case, upon affidavits, and in advance of the trial.* The facts upon which the motion is made being in dispute, no sufficient cause is shown for modifying the rule laid down on October 1, 1887, for the government of this calendar, namely, that cases must be tried when reached in their regular order according to date of issue and place on the calendar."

To substantially the same effect see:

Johnson v. *N. Y., O. & W. Ry. Co.*, 3 Fed. Supp. 80 (D. C. E. D. N. Y. 1931);

Kirkpatrick v. *Eastern Milling & Export Co.*, 135 Fed. 144 (C. C. D. N. J. 1904);
City of Detroit v. *Detroit City Ry. Co.*, 55 Fed. 569 (C. C. E. D. Mich. 1893);
Electric Vehicle Co. v. *Barney*, 143 Fed. 551 (C. C. S. D. N. Y. 1906).

In *Boynton* v. *Brown & Mathes*, 145 S. W. 242, 103 Ark. 513 (1912), it appeared that there had been conflicting claims to certain tracts of lands. An action by one claimant to quiet title was pending in the Federal court, and by another in the State court. The Federal action had evidently been commenced first, and reached decree first. That decree was taken as the basis for the Chancellor's finding against plaintiffs in the State action. Thereafter the Federal court's decree was reversed.

The attorneys for the plaintiffs in the State court suit then sued for their fees in connection with the trial of that case. The clients asserted as a defense the negligence of the attorneys in not obtaining a continuance of the State proceedings pending final disposition of the suit in the Federal court. The court held that the attorneys were not negligent, because (p. 245) "the pendency of the suit in the federal court against Haggart and McMasters was not a legal ground for a continuance".

This decision is significant, because the cases were so closely related that the decree in one was actually the basis for the decision of the second—and yet the court held that the second could not properly have been continued to await the final determination of the first.

In New York a long line of well considered decisions illustrates the principles hitherto discussed.

The New York Civil Practice Act, Section 167 (formerly Code of Civil Procedure, Section 805) provides:

> "Except as otherwise provided the court in which an action or proceeding is pending, or a judge of such court, in a proper case may grant a stay of proceedings upon such terms as to notice, security or otherwise, *as may be just.*"*

Since the statute leaves the words "a proper case" undefined, it is clear that the section must be construed according to the common law. The New York cases dealing with these Code "stays" are therefore directly applicable.**

Perhaps the leading case in New York on the question of the circumstances in which a suit may be lawfully stayed because of the pendency of another suit is *Dolbeer* v. *Stout,* 139 N. Y. 486 (1893). The plaintiff sued as the assignee of a claim on a contract. The defendant had previously instituted a suit against the plaintiff's assignor for damages for breach of the contract. The defendant then moved for a stay of the plaintiff's suit until determination of his suit against the plaintiff's assignor. The trial of the previous suit would obviously involve most if not all of the issues of law and fact in the second suit, and the trial court granted the defendant's motion. The Court of

---

*This provision is *in addition* to Rules 106 and 107 of the New York Rules of Civil Practice providing for the *dismissal of the complaint* on the ground "that there is another action pending between the same parties for the same cause". These Rules obviously take the place of, and are in substance, the common-law plea in abatement. This ground of motion is not available where the other action pending is in a foreign court. *Squier* v. *Houghton,* 131 Misc. 129.

**In spite of the fact that we had made this point plain in our brief in the Court of Appeals the defendants' brief still argues that the New York cases under this statute providing for stays *"upon such terms * * * as may be just"* are not good authority here because they arose under a statute.

Appeals held that "the court had no power to stay the plaintiff's suit under these circumstances".

The opinion continues (p. 489):

> "We find no authority justifying the staying of proceedings in one cause until the determination of another cause pending in another court, *where the party against whom the stay is sought is neither a party nor privy to such other action, and would not be bound by any adjudication therein.*
>
> "Where the decision in one action will determine the right set up in another action, and the judgment on one trial will dispose of the controversy in all the actions, a case for a stay is presented, but the power exercised by the Special Term in this case is, so far as we can ascertain, without precedent, nor does it seem supported by reason. (See *Travis* v. *Myers*, 67 N. Y. 542; *Third Ave. R. R. Co.* v. *Mayor, etc.*, 54 *id.* 159; *People* v. *Wasson*, 64 *id.* 167; *De Groot* v. *Jay*, 30 Barb. 483.)
>
> "The plaintiff here, having no interest in and not being a party to the other action, could not intervene therein, and by the order in question the trial of this action may be postponed indefinitely, awaiting the trial and determination of another action, the result of which will in no way affect his rights."

In *Clark* v. *Vilas National Bank*, 22 A. D. 605 (1897), the action was for the foreclosure of mortgages. The defendant bank was impleaded as a subsequent judgment creditor. There was already pending *on appeal* a prior action in which the bank had obtained a judgment adjudging the transfer from the debtor to the plaintiff mortgagee to be void and for the purpose of defrauding the bank. The plaintiff in the foreclosure suit of course was a party to the earlier proceeding. The bank therefore applied for

an order to restrain the plaintiff from proceeding in the later foreclosure action. The order granting a stay was reversed. The court said (p. 607):

> "As the Vilas National Bank applied for the order in question on the same facts as are set out in the answers as a defense to the actions, ordinarily the proper procedure for the parties would be to try the questions raised by the pleadings in the actions in the usual way, rather than on affidavits on a motion to stay proceedings.
>
> "A stay of proceedings has, however, been sometimes granted in actions where a former action *between the same parties* is pending *which will determine the issues raised in the latter.* It has been held, however, that *such a stay will not be directed where it appears that, whatever be the result of the first action, a trial of the second will be necessary. If only a portion of the questions involved in the last action will be settled in the first, a stay will not be granted.* (See 2 Rumsey's Pr. 178, and cases cited; *The People* v. *Northern R. R. Co.,* 53 Barb. 98, 121; *Burlingame* v. *Parce,* 12 Hun, 149, 151.)"

These cases and many others show that the New York rule as to these statutory stays (as distinguished from strict pleas in abatement, where both the parties and the issues must be identical, and where also there must be the same plaintiff and the same defendant in both suits) is that such a stay of one suit until the final determination of the other will not be granted, even where the parties are the same, unless the decision in the preferred suit will completely dispose of the stayed suit,—in other words, un-

less the judgment in the preferred suit *will be binding* upon the parties in the stayed suit and will finally and conclusively dispose of *all* the issues in the stayed suit.

Thus in *Burke* v. *Betts*, 126 Misc. 601 (N. Y. Co. 1926), the court said (p. 603):

> "*Obviously, it is only where a decision in the action sought to be continued would finally determine all questions presented in the other action, that a proper case for the stay is presented.* (*Dolbeer* v. *Stout*, 139 N. Y. 486; *Rosenberg* v. *Slotchin*, 181 App. Div. 137.) True it is that a judgment in favor of the *plaintiffs* in the equity action would constitute a bar to the further prosecution of the law action. But a judgment in favor of the *defendant* in the equity action would still leave the law action to be tried and determined, in which the administrators might set up in addition to the defense constituting their cause, new defenses not averred in the equity complaint. It, therefore, follows that the final determination of the equity suit would not necessarily terminate the litigation between the parties. (See, also, *Raymore Realty Co.* v. *Pfotenhauer-Nesbit Co.*, 139 App. Div. 126; *Walkup* v. *Mesnick*, 110 *id.* 326; *Jones* v. *Leopold*, 95 *id.* 404.)"

In *Rosenberg* v. *Slotchin*, 181 A. D. 137, 138 (1917), the rule is stated as follows:

> "It is only where the decision in one action will determine all the questions in the other action, and the judgment on one trial will dispose of the controversy in both actions that a case for a stay is presented. (*Dolbeer* v. *Stout*, 139 N. Y. 486, 489; *Ogden* v. *Pioneer Iron Works*, 91 App. Div. 394,

396; *Consolidated Fruit Jar Company* v. *Wisner*, 38 *id.* 369, 375.)"*

See also:

Ogden v. *Pioneer Iron Works*, 91 A. D. 394 (1904), and

Swift v. *Finnigan*, 53 A. D. 76 (1900).

The case of *Jenkins* v. *Baker*, 91 A. D. 400 (1904), conclusively negatives the proposition that an anticipated simplification of issues is a sufficient reason for granting a stay. The defendant in the suit sought to be stayed was being sued in a representative capacity. In a prior action, *already on appeal in the Court of Appeals*, the same plaintiff had recovered judgment against the defendant in her individual capacity on the same subject of litigation. The defendant had appealed the other action on the ground that the decision of the Appellate Division was in conflict with a case formerly decided by the Court of Appeals. The alleged ground for the defendant's application for a stay in the later case was the assumed conflict between those two decisions. Reversing the order which granted the stay, on the ground that "whatever disposition may be made of the first case, this one must still be tried", the court further said (p. 402):

> "Such a conflict, if it exist, is no valid ground for the staying of the plaintiff's proceedings, *nor is there any warrant for such a stay to be found in the uncertainty of the law on any question, however unsettled the law and conflicting the decisions.*"

*This case is also authority for the rule that a motion to stay an action will not be granted *until the issues in it are complete*, because (p. 139) "until both actions are fully at issue it is impossible to say that a determination in one action will dispose of the other".

In the case at bar the issues which the defendants assert will be simplified are necessarily issues of law. But if a court is justified in granting stays of this sort in order to simplify issues of law, it can only be to save *itself* labor, since it is not to be supposed that the court is not able to make the *correct* decision itself. If a stay can be justified on this ground, then *any* delay which will tend to shorten the time and effort which the court must devote to the case could be justified; and *thousands of cases would constantly be subject to stay while the courts in which they were pending awaited the action of other courts which might "simplify the issues" and provide "valuable precedents".*

In *Bisalky Fan Co.* v. *Mosier & Summers, Inc.* 177 A. D. 372 (1917), the action was to foreclose a mechanic's lien for ventilating apparatus furnished. A partial defense was that the plaintiff, in furnishing the apparatus, had violated a patent owned by a third person. An action was pending in the United States District Court by that third person against the plaintiff. The defendants in the State suit therefore moved for a stay until the determination of the Federal suit. The stay was granted. Reversing this order the Appellate Division said:

> "If only a portion of the questions involved in the second cause of action will be settled in the first action, a stay will not be granted. (*Clark* v. *Vilas Nat. Bank*, 22 App. Div. 605; *Dolbeer* v. *Stout*, 139 N. Y. 486.)
>
> "The matter relating to the infringement is set up as a partial defense. Even though the infringement is established in the suit pending in the Federal court, it will not be decisive of this action. Under such circumstances a stay should not be granted. *What bearing the question of infringement may*

have and to what extent the question may be tried in this action, can better be determined when all the facts are before the court."

This case well illustrates the dangerous practice upon which the order appealed from here invites the courts to enter. Suppose the principle followed by the court below were generally adopted. Before the court in any case can decide what value the decision in another pending case will have in "simplifying" the issues in the case where a stay is sought, or what other bearing it will have upon them, the court will perforce have to satisfy itself as to what the issues are in both cases, *and it will have to do this in disregard of possible later amendments in the pleadings in either of the cases, and without the benefit of clarification of the issues in the light of the evidence introduced.* This, at best, calls for a hasty and haphazard prejudging of the case on the motion for a stay.

In the two cases now before this Court on this appeal the defendants persuaded the lower court to make a mere *guess* at what the issues might ultimately be in these cases and in the *Bond and Share* case, or to disregard what they might be, since the stay was granted *before any answer had been filed in either of the cases at bar*, or in the *Bond and Share* case. That action carries the stay order in this case to the ultimate limit of abuse, even if we ignore the authorities reviewed above, which show conclusively that the lower court had no right, in any circumstances, to stay these plaintiffs' cases in order to give the defendants an opportunity to prosecute another case against another defendant to final judgment in another court.

APPENDIX B

Plaintiffs' Right to Relief in Equity

The cases granting equitable relief against the enforcement of unconstitutional laws are apt to exemplify two wholly different factual situations. The first situation is most frequently illustrated in cases of threats to enforce penalties or start criminal proceedings. At all events, these cases are frequently examples of the right of equity to interfere to prevent injurious harassment by a multiplicity of suits, and so in them the right to relief will often depend on the existence of threats to enforce *at once or soon.* Otherwise there may be no present injury.

The second situation is that in which existing legislation usually *carrying other potentiality of injury than merely penal provisions* may or will not be presently enforced, but where the danger of eventual enforcement is nevertheless causing present injury. The plaintiffs' cases fall of course into this class. In cases of this sort, there being no threat of many imminent actions to enforce penalties, the question is whether the threat of *eventual* enforcement is causing *present* damage. If it is, the need for relief is precisely the same as if the "threat" were to enforce at once. Equity would belie its name if it made imminence of *action* the sole test of jurisdiction. The real test in *all* cases is imminence of irreparable injury—imminence of action being obviously merely a circumstance which is sometimes relevant in determining present or imminent injury.

Pierce v. *Society of Sisters,* (1924) 296 Fed. 928; (1925) 268 U. S. 510, is probably the leading case. This was a suit to enjoin the enforcement of a statute requiring

parents to send their children to public schools, *a statute which was not to go into effect for nearly three years after the institution of the suit.* Plaintiff, as the owner of a private school, complained that it was being presently injured by the mere existence of the statute and the announced determination of the officials to enforce it when and if it went into effect three years thereafter. Plaintiff alleged that it was presently injured because third persons, — as teachers and parents—were deterred from entering into their normal contract relationships with plaintiff by reason of the menace of the prospective operation of the statute. There were no threats of action against the plaintiff, a private school, because the statute contained no penalties against private schools: it did not even mention them. Its sole requirement was that parents should send their children to public school during certain months of the school year. And there was no threat or indication of action by any official to enforce the statute during the three year period before it was to go into effect.

The essential issue at bar was consequently directly involved in that litigation. There being no threat of imminent action, nor indeed, any possibility thereof, it was contended that equity should not entertain the action, because of "prematurity".

In demonstrating the unsoundness of this contention, the court of three judges (Gilbert, Bean and Wolverton, *JJ.*) through Judge Wolverton wrote:

> "One of the searching questions involved by the controversy is whether the causes have been prematurely brought. It will be noted that the act complained against is to become effective on and after the 1st day of September, 1926, more than 2 years

and 5 months hence. This presents one of the elements which must be considered, along with the rest, for ascertaining and determining whether, under the showing made, the complainants, or either of them, are meeting with irreparable and irremediable injury, which may not be as speedily and adequately met by such remedies as the law side of the court may afford. The principle that the remedy at law, if relied upon to supplant the equitable jurisdiction, must not only be plain, speedy, and adequate, but as adequate, complete, practical, and efficient to meet the ends of justice as that in equity, is so well settled as to need no citation of authorities. See, however, *Terrace* v. *Thompson, supra.*

* * *

"Now, although the time at which the act is to become effective is somewhat remote, it is quite apparent, from the allegations of the bills, the work of destruction of complainants' occupation has already set in. They are losing their patronage, *traceable directly to the fact that the act is a statute duly adopted and promulgated.* * * * The damage, of course, is irreparable, and compensation does not afford adequate relief. The injury being of a quality that is continuous and accelerating, it must be stayed if the ends of justice are to be met. * * *

"It cannot be questioned that a party affected by an unconstitutional act need not wait until some step is taken, under the act, that would affect him injuriously. 'One does not have to await the consummation of threatened injury to obtain preventative relief.' *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 43 Sup. Ct. 658, 67 L. Ed. 1117. See, also, *Vicksburg Waterworks Co.* v. *Vicksburg,* 185 U. S. 65, 22 Sup. Ct. 585, 46 L. Ed. 808, where the court says:

> 'But it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. *The exercise of such jurisdiction is for the benefit of both parties; in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights.*' * * *
>
> "However, considering that injunctive relief is appropriate to prevent threatened or impending irreparable injury and damage to one's property rights, it can hardly be further urged that it is inapplicable here because the suits were prematurely instituted. The present bills of complaint show, not only a threat to enforce the act when it becomes effective, *but that complainants are suffering irremediable injury now, which will continue with increasing detriment and damage until their principal occupations are destroyed* and they are deprived of their property and property rights. We think the suits were not prematurely brought."

In affirming this view of the law, this Court (*Pierce* v. *Society*, 268 U. S. 510, 536) first pointed out that there was a *present injury* to plaintiff's right to conduct its business; that is, a practical interference with its entering into long term contracts for supplies, equipment, teachers and pupils, all this arising from the *mere existence* of the statute and the public announcement of its validity by the prosecuting officers, with their intention to attempt to enforce it when it should go into effect years later.

The Court accordingly decided that there was a present injury which equity should relieve, saying succinctly:

> "The suits were not *premature*. The injury to appellees was *present* and very *real*, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the Act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well recognized function of courts of equity."

Terrace v. *Thompson*, 263 U. S. 197, is another case where the same question of "prematurity" was raised. There the law prohibited transfers and leases of land to aliens. The suit was brought by a citizen landowner, alleging that the law was deterring the leasing of his land to an alien Japanese. The claim of the defendant that the bill lacked equity was based on the fact that the only action which the officials contemplated taking under the law with respect to "the alleged contemplated lease" (which lease, it thus appears, the officials first learned of through the bill) would be a single criminal proceeding against the landowner, *if after* the proposed lease was consummated, an investigation should disclose its illegality.*

This contention of "prematurity" was described by this Court as follows:

> "The Attorney General questions the jurisdiction of the court to grant equitable relief even if the statute be unconstitutional. He contends that the appellants have a plain, adequate and speedy remedy at law; that the case involves but a single transaction, and that, *if the proposed lease is made*, the only remedy which the State has, so far as civil proceedings are concerned, is an escheat proceeding in which the validity of the law complained of may be

*The defendant so pledged himself in an affidavit filed in the lower court.

> finally determined; that an acquittal of the Terraces of the criminal offense created by the statute would protect them from further prosecution, and that Nakatsuka is liable criminally only upon his failure to disclose the fact that he holds an interest in the land."

In overruling this contention, this Court pointed out that the statute purported to operate directly to prevent the consummation of the proposed contract between the plaintiff and a third person and that if the statute was unconstitutional, this in itself constituted an injury to plaintiff's rights against which equity would relieve. The Court said:

> "The Terraces' property rights in the land include the right to use, lease and dispose of it for lawful purposes (*Buchanan* v. *Warley*, 245 U. S. 60, 74), and the Constitution protects these essential attributes of property (*Holden* v. *Hardy*, 169 U. S. 366, 391), and also protects Nakatsuka in his right to earn a livelihood by following the ordinary occupations of life. *Truax* v. *Raich, supra; Meyer* v. *Nebraska*, 262 U. S. 390. If, as claimed, the state act is repugnant to the due process and equal protection clauses of the Fourteenth Amendment, then its enforcement will deprive the owners of their right to lease their land to Nakatsuka, and deprive him of his right to pursue the occupation of farmer, and the threat to enforce it constitutes a continuing unlawful restriction upon and infringement of the rights of appellants, as to which they have no remedy at law which is as practical, efficient or adequate as the remedy in equity. And assuming, as suggested by the Attorney General, that after the making of the lease the validity of the law might be determined in pro-

ceedings to declare a forfeiture of the property to the State or in criminal proceedings to punish the owners, it does not follow that they may not appeal to equity for relief. No action at law can be initiated against them until after the consummation of the proposed lease. The threatened enforcement of the law deters them. In order to obtain a remedy at law, the owners, even if they would take the risk of fine, imprisonment and loss of property, must continue to suffer deprivation of their right to dispose of or lease their land to any such alien until one is found who will join them in violating the terms of the enactment and take the risk of forfeiture. Similarly Nakatsuka must continue to be deprived of his right to follow his occupation as farmer until a land owner is found who is willing to make a forbidden transfer of land and take the risk of punishment. The owners have an interest in the freedom of the alien, and he has an interest in their freedom, to make the lease. *The state act purports to operate directly upon the consummation of the proposed transaction between them,* and the threat and purpose of the Attorney General to enforce the punishments and forfeiture prescribed prevent each from dealing with the other. *Truax* v. *Raich, supra.* They are not obliged to take the risk of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their rights. The complaint presents a case in which equitable relief may be had, if the law complained of is shown to be in contravention of the Federal Constitution."

Euclid v. *Ambler Co.*, 272 U. S. 365, illustrates the same principle. The plaintiff, a landowner, alleged that a zoning law deterred prospective buyers for industrial and commercial uses, "because of the existence of the ordinance

and the necessity thereby entailed of conducting burdensome and expensive litigation in order to vindicate the right to use the land for lawful purposes".

The decision that the action was not premature was specifically based upon the allegations of the bill that the ordinance *of its own force* operated to destroy possibilities of sale and constituted a *present* invasion of property rights. The Court said (p. 386):

> "A motion was made in the court below to dismiss the bill on the ground that, because complainant [appellee] had made no effort to obtain a building permit or apply to the zoning board of appeals for relief as it might have done under the terms of the ordinance, the suit was premature. The motion was properly overruled. The effect of the allegations of the bill is that the ordinance *of its own force* operates greatly to reduce the value of appellee's lands and destroy their marketability for industrial, commercial and residential uses; and the attack is directed, not against any specific provision or provisions, but against the ordinance as an entirety. Assuming the premises, the existence and maintenance of the ordinance, in effect, constitutes a present invasion of appellee's property rights and a threat to continue it. Under these circumstances, the equitable jurisdiction is clear. See *Terrace* v. *Thompson*, 263 U. S. 197, 215; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535."

The same sort of alleged "prematurity" and lack of equity was also urged in *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65. In that case the city was considering the possible construction or purchase of a plant in alleged infringement of plaintiff's franchise. As

in the case at bar, the city was proceeding to try a "test" suit in the state courts and was not threatening any steps to imperil plaintiff's rights *unless and until a favorable decision in the other suit was had.* The water company nevertheless brought suit in the Federal court for an injunction. The bill was dismissed for lack of equity, and in reversing the lower court this Court held that the suit was not premature and pointed out that the intervention of equity in such a case is for the benefit of both parties. It discloses to the defendant that he is proceeding or proposing to proceed without warrant of law and it protects the plaintiff from injurious impairment of his rights. The Court said:

> "It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainant's rights under the contract, that mere apprehension that illegal action may be taken by the city cannot be the basis of enjoining such action, and that therefore the Circuit Court did right in dismissing the bill. We cannot accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient and irreparable. The exercise of such jurisdiction is for the benefit of both parties; in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights."

In *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923), original suits were brought in the Supreme Court by the

States of Ohio and Pennsylvania to enjoin the State of West Virginia from enforcing a statute which, in the language of the Court, was "intended to compel the retention within the State [West Virginia] of whatever gas may be required to meet the local needs for all purposes." The suits were brought a few days after the statute became effective. West Virginia, the defendant, contended that the suits were premature since it did not appear that the privately owned corporations engaged in importing gas into the complainant States from West Virginia had threatened or intended to discontinue such importation of gas or that any order had been made or threatened by the West Virginia Public Service Commission affecting the right of these corporations to import gas into Ohio and Pennsylvania. The Court rejected this contention, because it found that the "situation when the suits were brought was such that the act *directly and immediately* would work a large curtailment of the volume of gas moving into the complainant States." The Court said (pp. 592-593):

> "The second question is whether the suits were brought prematurely. They were brought a few days after the West Virginia act went into force. No order under it had been made by the Public Service Commission; nor had it been tested in actual practice. But this does not prove that the suits were premature. Of course they were not so, if it otherwise appeared *that the act certainly would operate as the complainant States apprehended it would. One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.*"

In the case at bar of course the plaintiffs are already suffering injury caused by the threat of eventual enforcement *is already being inflicted.*

Cases in the lower Federal courts illustrating the same principle are:

Darger v. *Hill,* (C. C. A. 9th, 1935) 76 F. (2d) 198;

Portland Ry., Light & Power Co. v. *Portland,* 201 F. 119 (1912);

Detroit Creamery Co. v. *Kinnane,* 264 F. 845 (1920).

The principles for which these cases stand and for which they have been here cited are reviewed and affirmed in the recent decision of this court in *Carter* v. *Carter Coal Company,* 298 U. S. 238.

APPENDIX C

The *Wheeling Bridge* Case and the Other Cases Cited by the Defendants in the Same Connection

We submit the following three propositions as elementary in the law of *res judicata*. An issue of law involved in an action or suit which has gone to a proper and lawful final judgment is as finally and conclusively determined *for the parties to that suit** as is an issue of fact similarly involved. The rule is the same with respect to default judgments as with respect to judgments after a trial on the merits. The rule is also the same even if the final judgment is the unappealed judgment of a court of first instance posited on a rule of law later held by a higher court (even the court of last appeal) to be erroneous.

The defendants, then, ask the Court to believe that there is an exception to this rule—namely, in the case where the question of law on which the unappealed earlier judgment necessarily depends is a question of constitutional law, and the later decision is that of this Court.

This is, indeed, a startling proposition. The defendants refer to no statement of it in the digests or treatises (we also find none), and they cite only three cases in support of it. These are all old cases, so that if they do really establish or support the proposition, the defendants have unquestionably made a discovery which has escaped all the juridical writers. We submit that the text writers are not at fault, and that the defendants have discovered something in the cases they cite which is not really there.

---

*And also, of course, for their privies in law, though no such question is involved here.

The cases are: *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U. S. 421 (1855); *Mills* v. *Green*, 159 U. S. 651 (1895) and *Hatch* v. *Wallamet Iron Bridge Co.*, 27 Fed. 673 (1886).

In the *Wheeling Bridge* case the court had originally enjoined the operation of a bridge on the ground that it impeded commerce under the terms of an Act of Congress then in effect. *Congress subsequently enacted a new statute specifically authorizing the maintenance and operation of the bridge as a post-road.* The bridge later was blown down and defendants started the construction of a new bridge. The plaintiff sought to bring the construction of the new bridge within the terms of the earlier injunction. The court held that the construction and operation of the *new* bridge in compliance with the terms of the *new* statute would not be punished as a violation of the original injunction.

We submit that the *Wheeling Bridge* case in the aspect of it now under discussion is simply a case where a subsequent valid remedial statute* rendered lawful certain acts which theretofore had been unlawful. We believe that the *Mills* case (next to be discussed) shows clearly that no broader effect can be given to the decision in the *Wheeling Bridge* case than we have indicated.

In the *Mills* case the plaintiff obtained an order from the district court enjoining the defendant from performing any acts as supervisor of registration, on the ground that the statute of South Carolina providing for the registration

*Five Justices in all wrote opinions, but those who dissented from the majority decision that the old injunction was no longer effective, did so on the ground that *the Act of Congress was unconstitutional* or on other grounds having no bearing on the present question.

of voters for voting on a constitutional amendment was invalid and would result in the plaintiff's being denied his right to vote. The injunction was reversed by the circuit court of appeals. Shortly thereafter, and before the case was presented for decision by this Court, the elections were held as provided by the statute. This Court held, under the authority of the *Wheeling Bridge* case, that since the question of the plaintiff's injury had become moot it would not pass on the validity of the statute, and that consequently the bill must be dismissed.

In the *Hatch* case the only point *decided* was that the former decree of the court enjoining the construction of a proposed bridge, could not be attacked in a proceeding to dissolve the injunction. Everything else in the opinion is *obiter*. In this part of its opinion the court said:

> "I regarded the former bridge, and still regard it, as a very unwarrantable structure; but the *bridge which it is now proposed to build is much less objectionable, and, for all that appears, its construction may be no violation of the rule of law upon which the court acted under the theory by which it was originally governed in this matter.*"

The court then suggested that the matter might be properly brought before him for decision in a different proceeding, and in that connection said:

> "If the petitioners see proper to go on with the erection of the bridge, and parties interested in maintaining this decree desire to proceed by attachment against them for contempt, the court will require notice to be given to the parties, and will then proceed to examine into the question as to whether the decree should, under the circumstances, be en-

> forced. In this investigation two questions will be considered: First, whether the recent decision of the supreme court has superseded the decree, and changed the law on this subject; and second, whether this is the bridge in reference to which the injunction was issued."

It is clear from the foregoing language that the court was merely intending to state *what he conceived to be the questions which would be presented to him in the new proceedings.* He was not intimating how he would decide them, and the case therefore furnishes no support at all for the defendants' contention at bar.

We submit the following decisions of this Court as clearly negativing the defendants' theory of the *Wheeling Bridge* case.

In *Southern Pacific Railroad Company* v. *United States,* 168 U. S. 1, 48 the question was as to the conclusiveness of an earlier judgment establishing the right of a certain railroad company to certain land acquired by grant from the United States. In upholding the conclusiveness of the earlier judgment the Court made the following succinct summary of the principles underlying the sanctity of decrees of courts of competent jurisdiction, which is so fundamental in any sound system of jurisprudence:

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question

> or fact once so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

Authorities to the same effect could of course be multiplied endlessly. The fact that a decree may be based on errors of law makes it no less conclusive upon the parties to whom it applies. As the Court said in *American Express Co.* v. *Mullins*, 212 U. S. 311:

> "It was further suggested in the opinion of the judge of the Kentucky court that the Kansas judgment was wrong and in conflict with the decision of this Court and *American Express Company* v. *Iowa*, 196 U. S. 133. But as held in *Fauntleroy* v. *Lum*, 210 U. S. 230, 237.
>
> "A judgment is conclusive as to all the *media concludendi*, *United States* v. *California & Oregon Land Co.*, 192 U. S. 355; and it needs no authority to show that it cannot be impeached either in or out of the State by showing that it was based upon a mistake of the law."

See also *Rooker* v. *Fidelity Trust Company*, 263 U. S. 413, 415.

That a permanent decree of the court below in favor of the plaintiffs would preclude the successors in office of the present defendants from taking any action which the defendants could not take under the decree is also clear. See *New Orleans* v. *Citizens Bank,* 167 U. S. 371, 388; *Guntner* v. *Atlantic Coast Line Railroad Company,* 200 U. S. 273 (1906).

On the collateral point that an unappealed permanent decree of the court below in favor of the plaintiffs might be *modified* by the court in the event that the Act is upheld in the *Bond and Share* case, the defendants cite (p. 56) *United States* v. *Swift & Company,* 286 U. S. 106. We submit that this case not only does not support the defendants' contention, but implicitly repudiates it. The decree which the plaintiffs were there seeking to have modified contained *an express* provision that jurisdiction of the cause was retained for the purpose of taking such other action or adding such other relief as might become necessary or appropriate. The Court expressly distinguished such "continuing" decrees from decrees such as are sought by the plaintiffs in the cases at bar, in the following language:

> "* * * The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative."